

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PATRICIA P.,

Plaintiff,

v.

ACTING COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Case No. 3:23-cv-05023-TLF

ORDER REVERSING AND
REMANDING FOR AWARD OF
BENEFITS

I. BACKGROUND

Plaintiff filed this action pursuant to 42 U.S.C. § 405(g) for judicial review of defendant's denial of plaintiff's December 27, 2016 application for supplemental security income ("SSI") benefits. Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73, and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. Dkt. 2. Plaintiff challenges the Administrative Law Judge's (ALJ) decision finding that plaintiff was not disabled. Dkt. 4, Complaint.

On July 19, 2012, after a hearing before ALJ Michael C. Blanton, the Commissioner found that plaintiff was disabled as of August 24, 2010, and awarded SSI benefits. AR 477-486. The ALJ found plaintiff's mental health impairments caused limitations that met the criteria of section 12.04 and 12.06 of 20 C.F.R. 404 Subpart P, Appendix 1 (416.920(d) and 416.925). AR 483-485. The ALJ recommended

1 appointment of a representative payee, and continuing disability review in 24 months.
2 AR 486.

3 Plaintiff was incarcerated for almost three years¹, and after her release in 2016
4 she applied again on January 20, 2017, with an alleged onset date of December 27,
5 2016,² for SSI benefits. AR 579, 598. Plaintiff appealed the denial of her application for
6 benefits, and the hearing was held by Administrative Law Judge Allen G. Erickson on
7 September 18, 2018. AR 415-176.

8 The ALJ found plaintiff was not disabled; plaintiff filed a complaint with this Court
9 and the Honorable Michelle L. Peterson reversed and remanded the ALJ's decision.
10 *Patricia P. v. Commissioner of Social Security*, No. C20-5230-MLP, 2020 WL 7488814
11 (December 21, 2020). Judge Peterson found the ALJ erred by failing to provide clear
12 and convincing reasons to discount plaintiff's statements and testimony. 2020 WL
13 7488814 at *4-5. Judge Peterson also found error with respect to the ALJ's assessment
14 of medical opinions by Dr. Flanagan and Dr. Kester; but Judge Peterson found the ALJ
15 did not err when discounting Dr. Kimberly Wheeler's (examining doctor) August 2018
16 opinion, based on a one-time observation by Dr. Wheeler being inconsistent with
17 repeated observations in relevant medical records. *Id.* at *2-*3. Judge Peterson also
18 found no error regarding the ALJ's decision to discount the December 2016 opinions of
19 non-examining doctor, Dr. Phyllis Sanchez. *Id.* at *3.

22 ¹ Benefits ceased after plaintiff became incarcerated. 2020 WL 7488814, at *1; AR 1244. The precise start and end
23 dates of incarceration are not clear from the record. AR 1245.

24 ² The original date of alleged onset was August 24, 2010, but after incarceration it was modified to the date she
25 would qualify to receive benefits after being released. AR 579.

1 On March 4, 2021, the Appeals Council ordered a remand and ALJ Allen G.
2 Erickson held two hearings. AR 1282-1349. On October 17, 2022, ALJ Erickson issued
3 a written decision finding plaintiff was not disabled. AR 1233-1281.

4 The ALJ found plaintiff had the following severe impairments: major depressive
5 disorder with psychotic features, generalized anxiety disorder, post-traumatic stress
6 disorder (PTSD), and personality disorder. AR 1239. The ALJ found that plaintiff had the
7 residual functional capacity to: “perform a full range of work at all exertional levels but
8 with the following non-exertional limitations. She can understand, remember, and apply
9 short, simple instructions. She can perform routine, predictable tasks. She can make
10 simple decisions. She can work in an environment without fast-paced production
11 demands. She can be exposed to few, routine workplace changes. She can have no
12 interaction with the general public. She can have occasional interaction with supervisors
13 and a limited number of co-workers.” AR 1244. This RFC is almost verbatim the same
14 as the RFC decided by the ALJ on January 3, 2019 after the first hearing. AR 403. The
15 only change is in the interaction with others in the workplace, the previous RFC stated,
16 “[plaintiff] . . . can occasionally interact with co-workers” and did not mention
17 supervisors. *Id.*

18 II. DISCUSSION

19 This Court may set aside the Commissioner's denial of Social Security benefits if
20 the ALJ's findings are based on legal error or not supported by substantial evidence in
21 the record as a whole. *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017) (internal
22 citations omitted). Substantial evidence is “such relevant evidence as a reasonable
23 mind might accept as adequate to support a conclusion.” *Biestek v. Berryhill*, 139 S. Ct.

1 1148, 1154 (2019) (internal citations omitted). The Court must consider the
2 administrative record as a whole. *Garrison v. Colvin*, 759 F.3d 995, 1009 (9th Cir.
3 2014). The Court also must weigh both the evidence that supports and evidence that
4 does not support the ALJ's conclusion. *Id.* The Court may not affirm the decision of the
5 ALJ for a reason upon which the ALJ did not rely. *Id.* Rather, only the reasons identified
6 by the ALJ are considered in the scope of the Court's review. *Id.*

7 **A. Plaintiff's statements regarding symptoms and limitations**

8 Plaintiff asserts that the ALJ erred by rejecting her statements about severity of
9 symptoms and limitations concerning her mental health conditions. Dkt. 17, Plaintiff's
10 Opening Brief, at 14-17. The defendant contends there was substantial evidence to
11 support the ALJ's reasoning, because the medical record does not align with plaintiff's
12 statements; and because plaintiff's activities were beyond what she would have been
13 capable of if her statements about severity of symptoms and limitations were accurate.
14 Dkt. 20, Defendant's Brief, at 3-5.

15 The ALJ erred by discounting plaintiff's statements about her symptoms and
16 limitations as not credible. The AL did not make any finding of malingering. The ALJ did
17 not identify specific statements made by plaintiff that were less than credible; there are
18 simply general observations in the ALJ's decision -- based on the fact that she was calm
19 and pleasant in her interaction with medical providers during appointments, and that
20 there was evidence in the medical record that her symptoms improved over time. AR
21 1245, 1252.

22 The ALJ also stated that plaintiff "had difficulties explaining her mental health
23 symptoms. She testified that she has difficulties with diminished memory and auditory
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1 hallucinations.” AR 1244. The ALJ also found that plaintiff was not credible because her
2 activities of daily living were not consistent with the level of difficult symptoms she said
3 she was experiencing. AR 1245. Yet the records of plaintiff’s daily living show that she
4 was not leaving her residence except for basic necessities, to attend medical
5 appointments or treatment for her substance use disorder, she did not interact with
6 people except family and a few friends, and did not make it to a number of
7 appointments because her memory was failing.

8 The ALJ recognized that plaintiff’s medical record shows a pattern from the start
9 of the relevant period (December 27, 2016) through the date of the ALJ’s decision
10 (October 20, 2022), of plaintiff’s recurring panic attacks, that plaintiff experienced
11 auditory hallucinations, and that plaintiff’s symptoms waxed and waned during
12 treatment. AR 1245-1265. The ALJ stated that there were evaluation notes commenting
13 that plaintiff did not give full effort, and the ALJ observed that “claimant was difficult and
14 answered questions with, ‘I don’t know’ during an evaluation”. AR 1264 (referring to the
15 evaluation by Dr. Ruddell on March 30, 2022. AR 4466-4470). A few weeks after the
16 August 4, 2022 hearing, on September 15, 2022, at an ER visit, Dr. Natalie Reynolds
17 noted, “patient is bipolar and is a very difficult historian”, and also observed, “patient is
18 very slow to answer questions, occasionally answers nonsensically”. AR 5730-5731.
19 Other notes from care providers in the ER indicated on September 15, 2022 plaintiff
20 was malnourished – she appeared to be in a depressed state; she was taking a long list
21 of medications; due to chronic illness she had not been eating. AR 5740-5772.

22 The ALJ’s observation that plaintiff was not able to answer clearly is explained by
23 medical evidence in the record, and is not a reason to find plaintiff less than credible.
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1 Symptoms of mental illness may increase and decrease in severity; changes in
2 plaintiff's mental state are not clear and convincing reasons to discount her credibility.
3 See *Garrison v. Colvin*, 759 F.3d 995, 1017-1018 (9th Cir. 2014) (data points chosen by
4 the ALJ to illustrate why they find plaintiff less than credible must be examples of a
5 broader development). The ALJ did not provide clear and convincing reasons, based on
6 substantial evidence in the record, for rejecting plaintiff's testimony or statements.

7 The ALJ's determinations regarding a claimant's statements about limitations
8 "must be supported by specific, cogent reasons." *Reddick v. Chater*, 157 F.3d 715, 722
9 (9th Cir. 1998) (citing *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990)). In
10 assessing a Plaintiff's credibility, the ALJ must determine whether Plaintiff has
11 presented objective medical evidence of an underlying impairment. If such evidence is
12 present and there is no evidence of malingering, the ALJ must identify the testimony
13 found to be not credible, and can only reject plaintiff's testimony regarding the severity
14 of his symptoms for specific, clear and convincing reasons. *Laborin v. Berryhill*, 867
15 F.3d 1151, 1155 (9th Cir. 2017); *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014)
16 (citing *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)).

17 "Contradiction with the medical record is a sufficient basis for rejecting the
18 claimant's subjective testimony." *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d
19 1155, 1161 (9th Cir. 2008) (citing *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th
20 Cir. 1995)). But an ALJ may not reject a claimant's subjective symptom testimony "solely
21 on a lack of objective medical evidence to fully corroborate the alleged severity of pain."
22 *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991); *Byrnes v. Shalala*, 60 F.3d 639,
23 641-42 (9th Cir. 1995) (applying rule to subjective complaints other than pain).

1 Treatment records must not be cherry-picked; the ALJ must consider a particular record
2 of treatment in light of the overall diagnostic record. *Ghanim v. Colvin*, 763 F.3d at 1164.

3 An ALJ may discount a claimant's testimony based on daily activities that either
4 contradict their testimony or that meet the threshold for transferable work skills. *Orn v.*
5 *Astrue*, 495 F.3d 625, 639 (9th Cir. 2007).

6 In this case, plaintiff testified that she experienced panic attacks, racing thoughts,
7 distraction, lack of energy, and difficulty being around people. AR 452-453, 457-458,
8 464-466, 623-628, 655. Plaintiff testified that she experienced memory problems, and
9 anxiety. AR 1340.

10 She stated in a function report dated February 8, 2017, that she had nightmares,
11 flashbacks, and a racing mind, that interfered with sleep; she was only able to
12 accomplish the bare minimum of daily activities, such as making a sandwich or cleaning
13 up after herself for 30 to 60 minutes, shopping for groceries, going to medical
14 appointments or church. AR 625-627, 652-654. She also stated that she only went out
15 twice a week, she did not drive, and would shop only once per month. AR 626. She
16 stated she could only pay attention for four minutes. AR 628.

17 Plaintiff also testified that a couple of months prior to the August 2022, hearing,
18 she enrolled at Tacoma Community College to obtain her GED. AR 1311-1312. But the
19 GED program did not allow her to complete the course – she stated that she could not
20 attend, she was not able to do the work, she could not understand it, and could not get
21 the work done – she said she was unable to concentrate at all, and she was sick. AR
22 1313-1314. She said her back, stomach, eyes, and head would hurt; she could not
23 focus. AR 1314.

1 Plaintiff testified during the August 2022 hearing that her mental health
2 symptoms had become worse since the previous hearing. AR 1337. She stated she
3 heard voices – every day, happening mostly at night -- telling her to do things. She
4 testified that when she took medication, it helped with the voices. AR 1337-1338. But
5 she also testified the medication caused side effects, such as blackouts, waking up at
6 night and doing odd things, feeling that her body would want to “jump up and do stuff”.
7 AR 1339. Plaintiff testified that she “can’t focus. I feel like I am – I don’t know. There is
8 times I feel like I am – I can’t concentrate. I feel like I am going to freak out. I don’t
9 know.” AR 1337.

10 Plaintiff also testified that she thought she had been diagnosed with fibromyalgia,
11 and with migraines, and had taken medicines for those conditions; but she also stated “I
12 don’t remember. I do see a lot of specialists. It is hard for me to cope with this stuff
13 because then I am confused. I go to so many. It seems like you think I am lying but I am
14 not lying, I am telling the truth.” AR 1325-1326. When the ALJ asked whether plaintiff
15 gave a poor effort in medical testing, plaintiff said, “I don’t know what that means.” AR
16 1328. The ALJ rephrased the question and plaintiff indicated that she disagreed with the
17 characterization that she had intentionally not participated fully in the test. AR 1328.
18 Plaintiff responded by asking the ALJ, “why are you picking on me?” AR 1329. Plaintiff
19 also stated that she had recently been sick with COVID-19. AR 1330. Plaintiff said she
20 was not sure whether her recent headaches had been from the COVID-19 illness. AR
21 1331. She testified that she had migraine headaches once or twice per month, every
22 month. AR 1336.

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1 Plaintiff indicated that she was living with her daughter and baby granddaughter.
2 AR 1331. When her daughter left for work, the plaintiff's granddaughter would stay with
3 the baby's father. AR 1332. Plaintiff testified that she did not babysit her granddaughter,
4 due to plaintiff's medical conditions. AR 1333. Plaintiff stated that her other daughter
5 likewise would not leave grandchildren with her, due to plaintiff's medical conditions. AR
6 1335.

7 The medical records show that plaintiff engaged in psychotherapy and took a
8 variety of medications for anxiety, depression, PTSD, substance use disorder, and other
9 diagnosed mental health conditions such as bipolar disorder, and schizoaffective
10 disorder, from the time she was released from prison in December 2016, through
11 September 2022. AR 785-820, 849-850, 872-892, 895, 899, 902-915, 1067, 1087-1108
12 (mental health treatment records during 2017-2018 after release from prison), 1880-
13 1906 (records of medication management and psychotherapy appointments in January
14 and February 2019); AR 2389-2502, 2543-2585, 2715-2750 (medical records of
15 medication management and notes showing plaintiff's symptoms waxed and waned
16 during 2020 but were significantly worse in December 2020); AR 2624-2627, 2645
17 (acute anxiety attack in January 2021, plaintiff goes to the emergency room); AR 2756-
18 2798, 2857-2863, 3013-3014, 3028, 4124-4144 (records showing some progress in
19 early to mid-2021, but plaintiff continues to experience times of "really bad" anxiety
20 where she cried all day [AR 2857-2863], and symptoms such as hallucinations every
21 other day where her deceased brother tells her to self-harm [AR 3013-3014, June 22,
22 2021].

1 In July, August, and September 2021, plaintiff's symptoms continued to be
2 expressed as anxiety, hallucinations, depression and feeling so stressed she could not
3 study for her high school equivalency degree. AR 3301-3305. A treating provider
4 (Vanessa Cray, MMHNP) stated in November 2021 that due to her mental health
5 conditions and symptoms of ongoing, recurring, chronic depression, anxiety, mood
6 lability, intermittent hallucinations --plaintiff had many work-related limitations; and
7 plaintiff would be absent from work for five or more days each month, and would be off-
8 task more than 30% of an eight-hour workday, five days a week. AR 3997-4000.

9 On January 31, 2022, plaintiff (then age 44) stated to a mental health counselor
10 (during a remote interview by phone for COVID-19 precaution, with Angela Jutxus, MA
11 LSWAIC), that, she dropped out of school in eighth grade. AR 4388. She had self-
12 harmed from ages 19-20, cutting legs and hands. She attempted suicide at age 37. She
13 reported that she experienced (in January 2022) racing thoughts, nightmares, insomnia,
14 social withdrawal, sense of hopelessness about her future. AR 4389. Her parents were
15 alcoholics and abused each other, a babysitter had sexually abused plaintiff before she
16 was five years old, and her boyfriend had beat her and would not allow her to leave the
17 house. They had two children together, both of whom are now adults. AR 4388-4390.
18 Later she had two children with another partner, and those children were placed in
19 foster care; later her adult daughter adopted those two children. AR 4389. She stated
20 that her father had died of cancer three years ago, and her brother had committed
21 suicide by hanging two years ago. AR 4388. The intake evaluator commented that
22 plaintiff "sounded sad, confused, and had disorganized speech and thinking patterns."
23 AR 4397.

1 Between February and late May, 2022, the medical records indicate that plaintiff
2 was experiencing hallucinations (AR 4453-4455, 4554, 4743, 4747-4752); she tearfully
3 told a counsellor in April 2022, she was forgetful, was having difficulty concentrating,
4 gets “lost in her mind”, and could not remember her medical appointments. AR 5056-
5 5057.

6 In late May, 2022, plaintiff’s 25-year-old daughter told Vanessa Cray, a treating
7 provider, and Dr. Jennifer Guyant, an emergency room physician, that plaintiff’s mental
8 health symptoms seemed to be getting much worse – including bizarre behavior,
9 agitation, extreme anxiety. AR 4739, 5115. Although plaintiff was initially admitted to the
10 hospital for a mental health evaluation on May 26, she returned home that day – but her
11 daughter took her back to the emergency room on May 28, 2022 and she remained
12 hospitalized until May 31, 2022. AR 5064-5074. Her daughter told ER doctors that
13 plaintiff was hallucinating, could not take care of herself (not showering), plaintiff was
14 unsteady on feet, was not making sense, and appeared to be sleepwalking or
15 dissociating. AR 5064.

16 Plaintiff had initially been referred for involuntary mental health treatment but no
17 bed was available; on May 31 her symptoms had become more manageable and she
18 returned home. AR 5070-5074. During the 12-month period ending 7-6-2022, there
19 were 17 times plaintiff was in the ER. AR 5277-5281. Plaintiff was experiencing
20 symptoms of anxiety, depression, and drug induced akathisia. AR 5407-5414, 5730-
21 5778, 5811. On September 15, 2022, at another ER visit, Dr. Natalie Reynolds noted,
22 “patient is bipolar and is a very difficult historian”, and also observed, “patient is very
23 slow to answer questions, occasionally answers nonsensically”. AR 5730-5731. Other
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1 notes from care providers in the ER indicated on September 15, 2022 plaintiff was
2 malnourished – she appeared to be in a depressed state; she was taking a long list of
3 medications; due to chronic illness she had not been eating. AR 5740-5772.

4 The ALJ erred by rejecting plaintiff's testimony and statements about symptoms
5 and work-related limitations. Although plaintiff's symptoms waxed and waned at times,
6 there was a progression of anxiety, depression, medication side effects, and
7 hallucinations, that waxed and waned but also became worse over time. There is not
8 substantial evidence, nor clear and convincing reasons, for the ALJ to reject plaintiff's
9 statements and testimony.

10 **B. Medical evidence.**

11 Plaintiff asserts the ALJ erred by failing to provide legally sufficient reasons,
12 supported by substantial evidence, for discounting the medical opinions of Dr. Kimberly
13 Wheeler, Ph.D., Dr. Phyllis Sanchez, Ph.D., or Dr. Alysa Ruddell, Ph.D. Dkt. 17,
14 Plaintiff's Opening Brief, at 4-14.

15 Plaintiff filed their application prior to March 27, 2017, therefore under the
16 applicable regulations, an ALJ was required to provide "clear and convincing" reasons
17 to reject the uncontradicted opinions of an examining doctor, and "specific and
18 legitimate" reasons to reject the contradicted opinions of an examining doctor. See
19 *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995). When a treating or examining
20 physician's opinion is contradicted, the opinion can be rejected "for specific and
21 legitimate reasons that are supported by substantial evidence in the record." *Id.*
22 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722
23 F.2d 499, 502 (9th Cir. 1983)).

1 An examining physician's opinion is "entitled to greater weight than the opinion of
 2 a non-examining physician." *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (citations
 3 omitted); see also 20 C.F.R. § 404.1527(c)(1) ("Generally, we give more weight to the
 4 opinion of a source who has examined you than to the opinion of a source who has not
 5 examined you"). A non-examining physician's or psychologist's opinion may not
 6 constitute substantial evidence by itself sufficient to justify the rejection of an opinion by
 7 an examining physician or psychologist. *Lester*, 81 F.3d at 831 (citations omitted).
 8 However, "it may constitute substantial evidence when it is consistent with other
 9 independent evidence in the record." *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th
 10 Cir. 2001) (citing *Magallanes, supra*, 881 F.2d at 752). "In order to discount the opinion
 11 of an examining physician in favor of the opinion of a non-examining medical advisor,
 12 the ALJ must set forth specific, *legitimate* reasons that are supported by substantial
 13 evidence in the record." *Nguyen v. Chater*, 100 F.3d 1462, 1466 (9th Cir. 1996) (citing
 14 *Lester*, 81 F.3d at 831).

15 1. Dr. Kimberly Wheeler, Ph.D.

16 Judge Michelle L. Peterson previously decided the ALJ did not err when
 17 discounting Dr. Wheeler's opinions from an August 2018 evaluation. *Patricia P. v.*
 18 *Commissioner of Social Security*, No. C20-5230-MLP, 2020 WL 7488814 (12-21-2020)
 19 at *2-*3. Among the reasons given by the ALJ for discounting Dr. Wheeler's opinions,
 20 approved by Judge Peterson, was that repeated consistent observations throughout the
 21 record were inconsistent with Dr. Wheeler's one-time observation and assessment.

22 Although there has been additional evidence entered into the record after the
 23 date of Dr. Wheeler's first assessment, Judge Peterson's decision was based on the
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1 same evidence this Court has reviewed, during the period of Dr. Wheeler's first
2 evaluation, in August 2018. AR 1198-1202. This Court will not re-iterate the reasoning
3 of Judge Peterson; the Court agrees with and adopts her reasoning for purposes of the
4 current appeal.

5 Regarding Dr. Wheeler's second examination and assessment of plaintiff (AR
6 2293-2297), on March 13, 2020, Dr. Wheeler found plaintiff's depression had become
7 worse since the previous examination. AR 2296. Dr. Wheeler determined that plaintiff's
8 limitations were severe overall, and specifically found the following areas of severe
9 limitations: performing activities within a schedule; maintaining regular attendance;
10 being punctual within customary tolerances without special supervision; ability to
11 communicate and perform effectively in a work setting; ability to complete a normal
12 workday and work week without interruptions from psychologically based symptoms. AR
13 2295. Dr. Wheeler found a marked limitation in plaintiff's ability to adapt to changes in a
14 routine work setting and in plaintiff's ability to ask simple questions or request
15 assistance. AR 2295. Dr. Wheeler found the impairments and limitations would last 60
16 months, or permanently. AR 2295.

17 Dr. Wheeler's second assessment is supported by the medical record. See AR
18 4398-4406 (evaluation and outpatient therapy notes, dated 2-1-2022). Dr. Wheeler's
19 evaluation and assessment is consistent with, and corroborated the opinions of Dr.
20 Ruddell. AR 4465-4471 (assessment dated 3-30-2022). For example, therapy notes and
21 medication appointments during 2019-2020 show plaintiff was continuing to experience
22 severe anxiety, lack of progress, saying "I don't know" to many questions, having
23 auditory hallucinations of her brother, who was deceased, talking to her once per week
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1 and sometimes more often. AR 2421, 2426-2429, 2446-2448, 2451, 2489-2493, 2499.
2 Plaintiff reported side effects from psychotropic medications, such as being groggy. AR
3 2490. The treatment records show periods of worse symptoms and times where there
4 was improvement, and the overall diagnostic and follow-up documentation shows
5 waxing and waning of severity but the impairments were progressively getting worse.
6 The longitudinal treatment record is consistent with Dr. Wheeler's second assessment.

7 Regardless of whether the Court applies the clear and convincing standard, or
8 the specific and legitimate standard, the ALJ erred by discounting Dr. Wheeler's 2020
9 opinions.

10 2. Dr. Phyllis Sanchez, Ph.D.

11 Judge Michelle L. Peterson previously decided the ALJ did not err when
12 discounting Dr. Sanchez's opinions, dated November 21, 2016, AR 714-717. *Patricia P.*
13 *v. Commissioner of Social Security*, No. C20-5230-MLP, 2020 WL 7488814 (12-21-
14 2020) at *3-*4. This Court will not re-iterate the reasoning of Judge Peterson; the Court
15 agrees with and adopts her reasoning for purposes of the current appeal.

16 3. Dr. Alysa A. Ruddell, Ph.D.

17 Under either the clear and convincing, or the specific and legitimate standard, the
18 ALJ erred by discounting Dr. Ruddell's opinions. Dr. Ruddell evaluated plaintiff on
19 March 30, 2022. AR 4466-4470. Plaintiff stated that she had five children but could not
20 recall the years they were born, or their ages. AR 4466. She knew she had been in
21 prison but could not recall the dates. AR 4467. Plaintiff explained that she had
22 hallucinations such as seeing "black things." AR 4469. She reported auditory
23 hallucinations as well. *Id.* Dr. Ruddell made clinical findings of marked anxiety and
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1 marked depression, and diagnosed major depression, with an over-all severity rating of
2 4, marked. AR 4467. Dr. Ruddell assessed one severe limitation: plaintiff's ability to
3 "understand, remember, and persist in tasks by following detailed instructions." AR
4 4468. In addition, Dr. Ruddell made findings of several marked limitations: plaintiff's
5 ability to perform activities on schedule, regularly attend work, and to be punctual;
6 plaintiff's ability to learn new tasks; plaintiff's ability to adapt to changes in a routine
7 work setting; plaintiff's ability to complete a normal workday, work week, "without
8 interruptions from psychologically based symptoms", and plaintiff's ability to set realistic
9 goals and plan independently. AR 4468.

10 Dr. Ruddell determined that effects on plaintiff's basic work activities were not the
11 result of a substance use disorder; but Dr. Ruddell also recommended chemical
12 dependency assessment or substance use treatment. AR 4468. Dr. Ruddell opined the
13 impairments would remain for at least 12 months, with available treatment. *Id.*

14 Dr. Ruddell's assessment is consistent with the medical records during the
15 relevant period. As described above, plaintiff's condition became so difficult during
16 2021-2022 that she was in the emergency room multiple times, and was hospitalized in
17 May of 2022 due to the severity of her mental health conditions.

18 **C. Harmless error**

19 The errors of the ALJ in this case were not harmless. An error that is inconsequential
20 to the non-disability determination is harmless. *Stout v. v. Comm'r, Soc. Sec. Admin.*,
21 454 F.3d 1050, 1054 (9th Cir. 2006). If the errors of the ALJ result in a residual
22 functional capacity (RFC) that does not include relevant work-related limitations, the
23 RFC is deficient and the error is not harmless. *Id.* at 1052, 1054; *see also, Carmickle v.*

1 *Comm'r. Spc. Sec. Admin.*, 533 F.3d 1155, 1160 (9th Cir. 2008); *Embrey v. Bowen*, 849
2 F.2d 418, 422-423 (9th Cir. 1988); *Stramol-Spirz v. Saul*, 848 Fed. Appx. 715, 718 (9th
3 Cir. 2021) (unpublished).

4 The ALJ's hypothetical for the Vocational Expert (VE) referred to limitations that
5 were later reflected in the RFC. See AR 1341-1345. In addition, the ALJ asked the VE
6 whether, if a person missed more than one workday per month, needed more than the
7 customary number and length of breaks during each workday, and would be
8 consistently off-task more than 15% of the workday, would that person be able to
9 sustain full-time employment; the VE answered, no. AR 1296-1297. These limitations
10 were not included in plaintiff's RFC.

11 The attorney for plaintiff asked the VE whether odd behavior would change the VE's
12 opinion, and the VE responded: "if a person is having odd behavior and it is distracting
13 to coworkers and it is going to persist more than once or twice it is likely the person
14 would terminated." AR 1344. Plaintiff's attorney also asked the VE whether a person
15 who had difficulty grasping even simple, repetitive job tasks and are not able to grasp or
16 remember those concepts – would that be tolerated in a competitive work environment?
17 AR 1344. The VE responded, "I think after 30 days if a person was continuing to
18 struggle and they are not remembering – what we are really talking about is a situation
19 where the person needs to be in sheltered work like a sheltered work shop." AR 1345.

20 The ALJ failed to include important limitations in the RFC – plaintiff was
21 hallucinating regularly and going to the emergency room at least once per month during
22 2021-2022. In addition, there is evidence in the record that plaintiff had anxiety not only
23 from her mental health conditions, but also drug side effects. There were no questions
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1 from the ALJ about any drug side effects, and how the medications plaintiff was taking
2 may or may not affect her RFC. When plaintiff answered, “I don’t know”, during her
3 hearing, AR 1282-1349, this was consistent with how she presented in the ER during
4 Mary 2022. Plaintiff was experiencing symptoms of anxiety, depression, and drug
5 induced akathisia. AR 5407-5414, 5730-5778, 5811. On September 15, 2022, at
6 another ER visit, Dr. Natalie Reynolds noted, “patient is bipolar and is a very difficult
7 historian”, and also observed, “patient is very slow to answer questions, occasionally
8 answers nonsensically”. AR 5730-5731. Other notes from care providers in the ER
9 indicated on September 15, 2022 show plaintiff was malnourished – she appeared to
10 be in a depressed state; she was taking a long list of medications; due to chronic illness
11 she had not been eating. AR 5740-5772. The record shows that at the time of plaintiff’s
12 hearing, on August 4, 2022 (AR 1304-1349), plaintiff testified her symptoms were as
13 reflected in documents of the physicians and other medical professionals, describing
14 her struggle to communicate and the symptoms she and her daughter were describing
15 during plaintiff’s multiple ER visits and counselling sessions.

16
17 **D. Whether the Court should reverse with a direction to award benefits**

18 “The decision whether to remand a case for additional evidence, or simply to
19 award benefits[,] is within the discretion of the court.” *Trevizo v. Berryhill*, 871 F.3d 664,
20 682 (9th Cir. 2017) (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). If
21 an ALJ makes an error and the record is uncertain and ambiguous, the court should
22 remand to the agency for further proceedings. *Leon v. Berryhill*, 880 F.3d 1041, 1045
23 (9th Cir. 2017). Likewise, if the court concludes that additional proceedings can remedy
24
25

1 the ALJ's errors, it should remand the case for further consideration. *Revels*, 874 F.3d
2 648, 668 (9th Cir. 2017).

3 The Ninth Circuit has developed a three-step analysis for determining when to
4 remand for a direct award of benefits. Such remand is generally proper only where

5 “(1) the record has been fully developed and further administrative
6 proceedings would serve no useful purpose; (2) the ALJ has failed
7 to provide legally sufficient reasons for rejecting evidence, whether
8 claimant testimony or medical opinion; and (3) if the improperly
9 discredited evidence were credited as true, the ALJ would be
10 required to find the claimant disabled on remand.”

11 *Trevizo*, 871 F.3d at 682-83 (quoting *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th
12 Cir. 2014)).

13 The Ninth Circuit emphasized in *Leon* that even when each element is satisfied,
14 the district court still has discretion to remand for further proceedings or for award of
15 benefits. *Leon*, 80 F.3d at 1045.

16 Here, plaintiff asks that the Court remand for an award of benefits based on the
17 ALJ's errors in evaluating the medical opinion evidence and plaintiff's subjective
18 testimony. The record is complete; there is no ambiguity and the Court has found
19 several errors in the ALJ's evaluation of plaintiff's statements about symptoms and
20 limitations, and the medical opinion evidence. *Garrison*, 759 F.3d at 1021-22, (citing
21 *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (“Allowing the Commissioner to
22 decide the issue again would create an unfair ‘heads we win; tails, let’s play again’
23 system of disability benefits adjudication.”)).

24 The ALJ would be required to find plaintiff disabled on remand, because if the Court
25 credits plaintiff's statements and testimony as true, and also credits the medical opinion
evidence as true, she would not be able to work in the occupations identified by the VE

1 and she would meet the criteria for disability. See *Lingenfelter v. Astrue*, 504 F.3d 1028,
2 1041 (9th Cir. 2007) (“[W]e will not remand for further proceedings where, taking the
3 claimant's testimony as true, the ALJ would clearly be required to award benefits.”). Dr.
4 Ruddell found several marked limitations: plaintiff's ability to perform activities on
5 schedule, regularly attend work, and to be punctual; plaintiff's ability to learn new tasks;
6 plaintiff's ability to adapt to changes in a routine work setting; plaintiff's ability to
7 complete a normal workday, work week, “without interruptions from psychologically
8 based symptoms”. AR 4468. Dr. Wheeler found several severe limitations -- performing
9 activities within a schedule; maintaining regular attendance; being punctual within
10 customary tolerances without special supervision; ability to communicate and perform
11 effectively in a work setting; ability to complete a normal workday and work week
12 without interruptions from psychologically based symptoms. AR 2293-2297.

13
14 Accordingly, remand for an award of benefits is the appropriate remedy.

15
16 CONCLUSION

17 Based on the foregoing discussion, the Court concludes the ALJ improperly
18 determined plaintiff to be not disabled. Therefore, the ALJ's decision is reversed and
19 remanded for an award of benefits.

20 Dated this 15th day of November, 2023.

21 

22 Theresa L. Fricke
23 United States Magistrate Judge
24
25